IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1194 of 2004

With

CRIMINAL APPEAL No. 1222 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ATULKUMAR VIKASCHANDRA VAJPAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MS SADHANA SAGAR for Appellant in both the appeals
MR AJ DESAI ADDL. PUBLIC PROSECUTOR for respondents in both the appeals
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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 17/25-09-2007

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. By these two Criminal Appeals filed under Section 374 (2) of the Code of Criminal Procedure ('the Code' for short), the appellant of both these appeals ('the accused' for short) have challenged the judgment and order dated 25.5.2004 rendered in Sessions Case No.57 of 1999 by the learned Additional Sessions Judge (2nd Fast Track Court), Surat, by which both the accused have been convicted for the offences under Sections 302, 364, 394, 397, 398 and 201 read with Section 34 of the Indian Penal Code ('IPC' for short) and each of them has been sentenced to the following

terms:

S.No	Term of sentence	Section
1.	Imprisonment for life and fine of Rs.5,000/- i.d., RI for one year	302/34
2.	R.I. for five years and fine of RS.2,000/- i.d., RI for three months	364/34
3.	R.I. for ten years and fine of Rs.2,000/- i.d., RI for three months	394,397,398/34
4.	RI for three years and fine of RS.1,000/- i.d. RI for one year	201/34

It is also ordered that all the above sentences shall run concurrently.

2. The prosecution version, as unfolded during the trial, is as follows:

2.1. On 3.6.1998, Noormohamad Pir Mohamad Shaikh has lodged one missing entry being “Janva Jog” Missing Register No.19/1998 with Mahidharpura Police Station that his son viz., Mohmed Riyaz who was running taxi bearing registration No.GJ-5-U-9969 had gone to the Taxi Stand, Opposite Surat Railway Station on 1.6.1998 at about 8.00 A.M., and at about 11.00 A.M., said

Mohmed Riyaz had gone to Vadodara with passengers and was supposed to return on 2.6.1998 at about 9.00 A.M. but somehow said Mohmed Riyaz had not returned till 3.6.1998.

2.2. It is further case of the prosecution that one R.B. Patil, P.S.I. State Highway Branch from Fajalpur to Karjan, Highway Mobile No.1 was on his duty on 4.6.1998 and while patrolling when he was passing through the sim of Baman village, he found some street dogs barking near the Modern Petrofils Company and smelt some foul smell and, therefore, he stopped the jeep and went to the said place where he found a decayed dead body of a male person lying in the bushes. It is further case of the prosecution that the said PSI RB Patil has informed at the nearest Police Station i.e., Karjan Police Station about the incident and thereafter the police officers from Karjan Police Station arrived at the said place and carried out the required proceedings and thereafter one A.R. Choudhary, Sr. PSI Karjan Police Station, lodged an FIR being CR No.I-

159/1998 for the offences punishable under Sections 302 and 201 IPC. During the course of investigation it was found that the said dead body was of Mohmed Riyaz and, therefore, the muddamal articles and papers have been transferred to Mahidharpura Police Station, Surat.

2.3. It is further case of the prosecution that prior thereto another FIR has been lodged by one Mohmed Firoz Noormohamad Shaikh with the Mahidharpura Police Station, Surat City being CR No.I-234 of 1998 on 3.6.1998 for the offences punishable under Sections 364, 394, 34 IPC and 25 (1) (a) of the Arms Act. It is alleged in the said FIR that the younger brother of the complainant viz., Mohmed Riyaz i.e, the deceased was running taxi bearing registration No.GJ-5-U-9969 and used to go to Taxi Stand, near Surat Railway Station at 8.00 A.M., and return at 9.00 P.M. It is alleged that, as usual, on 1.6.1998 he went to the said taxi stand, near Surat Railway Station and on the next day i.e., 2.6.1998, the

complainant had inquired about the deceased to one Ghulam Mohamad Shaikh who is also a taxi driver, residing in the same vicinity and the complainant was informed that the deceased went to Kribhco and then to Vadodara with passengers but till 12.00 noon of 3.6.1998 he did not return to his home and, therefore, father of the deceased has lodged a missing entry. It is also alleged that on 3.6.1998 the complainant has received an information at 3.30 P.M. from the Police Station that on Baroda Highway the accused persons viz., (1) Raju Babulal Yadav and (2) Atulkumar Vikaschandra Vajpai had committed murder of Mohmed Riyaz by using fire arms and stones and thereafter ran away with the said taxi - Maruti Van. It is further alleged that the said accused persons have been arrested with the said Maruti Van by B.N. P. Devas Police Station. Under these circumstances, the aforesaid FIR came to be lodged.

2.4. Pursuant to the registration of the complaint at Mahidharpura Police Station, Surat

City, investigation was put into motion. During the course of investigation, the complainant Mohmed Firoz Noormohamad Shaikh was informed by the Police Constable from Mahidharpura Police Station that ahead of Miyagam Karjan there was a village called Baman where opposite Modern Petrofils towards the west at a distance of approximately 20 ft, a corpse has been found. Therefore, he, his elder brother Mohmed Rafiq, his other relatives, namely, Mohmed Salim Ghulam Mohamad Shaikh, etc., had gone to Baman village. After going there, his elder brother Mohmed Rafiq Noormohamad Shaikh had identified the dead body, which was his brother Mohmed Riyaz's dead body. Two to three fingers of his brother Mohmed Riyaz's right hand were cut. He had seen his brother's dead body. The wrist of his brother's left hand had been amputated. A large metal rock was lying at a distance of two feet from his brother's body, on which there were dried bloodstains. His brother's dead body had decayed. A knife was lying at a distance of two to four feet from his brother's dead body. The police had

seized the knife and metal rock. Thereafter post mortem examination was conducted on 4.6.1998 and thereafter they had taken his brother's dead body and buried it at 12 O'clock at night at Surat. His brother's Maruti van had been seized by the Devas Police Station.

2.5. During the course of further investigation, statement of Babulal Siddhanath Malvi, a Home Guard, who was discharging duties at the Thana Bank Note Press at Devas was recorded. He has stated that on 3.6.1998 a general checking of vehicles was being carried out along with the police at National Highway. At that time he was standing near the Police Station and S.C.M. Vikramsinh Rathod had told him to come with him for checking of vehicles. Along with them Surajpalsinh who was the Station Officer had also proceeded for checking of vehicles. Thereafter they had reached near the Bhopal Crossroads at a distance of two furlongs from the Police Station. At that time as they suspected one Maruti van, it was stopped. The said car had

a number plate in front but there was no number plate at the back. The number plate on the front side had the number D.L.2.9426. They had checked the said van. Raju alias Rajpal was driving the van. As the van has come near their Thana and stood there, they had asked their names and addresses and on suspicion being raised they had checked the van. A 315 bore Tamancha was found from Raju and upon asking about the licence he had informed that he did not have a licence and hence the same was seized. There were two persons in the van. There was a suitcase which was with Raju and upon opening it, addresses of Surat were found. The said papers were pertaining to Hotel Hariyali of Surat. From the other bag which was with the other person, bloodstained clothes were found which consisted of a lungi, towel, shirt, pant, etc. Upon searching the other person, a knife was found which was about 13 to 14 inches long. He has, therefore, seized the muddamal as well as the vehicle. During the course of further investigation, upon the number plate being found from underneath the seat of the vehicle

afterwards, it was learnt that the real number of the Maruti Van is GJ-5-U-9969. As the papers of the vehicle were of Gujarat, upon finding them from the van the same were seized. The second person who was in the van was Atulkumar and, therefore, he had arrested both the persons. During the course of further investigation, both the accused were brought from Devas to Surat under transfer warrant along with the muddamal seized, i.e., weapons and the Maruti Van. Thereafter panchnamas of the person of the accused persons were prepared, panchnama of the Maruti Van was also prepared and statements of witnesses were recorded and TI Parade was arranged through Executive Magistrate in presence of panchas and in TI parade the persons who were running taxi at Surat Railway Station Tax Stand and whose statements were recorded earlier, identified both the accused persons in presence of Executive Magistrate. Thereafter muddamal which were recovered from the scene of offence were sent to FSL, obtained post mortem as well as FSL reports and as sufficient incriminating

evidence was found against both the accused persons, they were charge-sheeted in the Court of learned JMFC, Surat where it is numbered as Criminal Case No.678 of 1998.

2.6. As the offence under Section 302, etc., IPC are exclusively triable by a Court of Sessions, the learned JMFC, Surat committed the case to the Court of Sessions, Surat where it was numbered as Sessions Case No.57 of 1999.

2.7. The learned Additional Sessions Judge, Surat to whom the case was made over for trial, framed the charges against both the accused persons for commission of the offences under Sections 364, 394, 397, 302, 34 IPC, Section 25 (1) (1B) (a) of the Arms Act and Section 135 of the Bombay Police Act. The charges were read over and explained to the accused persons. They pleaded their innocence and claimed to be tried and, therefore, they were put to trial.

2.8. To prove the culpability of the accused

persons, the prosecution has examined as many as 30 witnesses and relied upon their oral testimonies, the details of which have been given in paragraph 3 of the impugned judgment and order, as under:

P.W.No	Name and status	Ex.No.
1	Mohmed Firoz Noormohamad Shaikh, brother of the deceased-complainant	26
2	Mohamad Mustaq Mohamad Ismail Shaikh, Panch witness in respect of the panchnama of identification of the dead body	28
3	Dineshchandra Chhotalal Modi, the witness who has identified the accused	30
4	Dr. Jai Arvindbhai Shah, who performed the post mortem examination	32
5	Rameshchandra Jerambhai Patel, witness who has prepared the map of the place of offence	35
6	Mohmed Salim Ghulam Mohamad Shaikh, witness who was running the taxi on rent	37
7	Majidkhan Ahmedkhan, witness	38
8	Zamir Ahmed Ghulam Rasul Shaikh, panchnama of the panchnama by which the clothes of the deceased was seized.	39
9	Rambahadur Mataprasad Mishra, panch witness of the panchnama of the physical condition of the accused persons	41

P.W.No	Name and status	Ex.No.
10	Mohamad Shahi Ghulam Mohamad, witness who identified the accused	45
11	Bhanubhai Ratanbhai Patel, Executive Magistrate, who conducted the TI Parade of the accused	46
12	Dilip Parameshwar Pawar, panch witness of the panchnama of the place of offence	50
13	Bilal Mohamad Miya Mohamad, witness who identified the accused	52
14	Bhikhusingh Gambhirsingh Chauhan, panch witness in respect of the panchnama in respect of the place where the dead body was lying	54
15	Manohar Kishanchand Naniani, witness who prepared the number plate of the vehicle	55
16	Satish Sahajarilal Chopra, witness who prepared the number plate of the vehicle	56
17	Amrutlal Ramjibhai Choudhari, PSI	58
18	Rameshchandra Baliram Patil, PI	63
19	Anil Narendra Bhatt, PSI	64
20	Gnandev Sahadhu Sarode, Head Constable	66
21	Lotan Nimba, ASI	68
22	Mohmed Rafiq Noormohamad, brother of the deceased, witness	70
23	Babulal Siddhanath Malvi, witness	73
24	Kishorbhai Umedsinghbhai, ASI	79
25	Arjun Tulsiram Borse, PSI	80

P.W.No	Name and status	Ex.No.
26	Raisingh Devisingh, Panch witness	86
27	Bhupendra Jayantilal Kansara, PI	88
28	Vishnubhai Ishwarbhai Patel, PSI	89
29	Jayantilal Mafatlal Patel, PSI	90
30	Somabhai Babarbhai Ravat, I.O.	91

2.9. In order to bring home the charges levelled against the accused persons, the prosecution has produced a number of documents and relied upon the contents of the same, the details of which have been given in paragraph 4 of the impugned judgment and order, which will be discussed hereafter in this judgment as and when required.

2.10. After recording of the evidence of the prosecution witnesses was over, the trial court explained to the accused persons the circumstances appearing against them in the evidence of the prosecution witnesses and recorded their further statement as required under Section 313 of the Code. In their further

statement, the accused have denied the prosecution case in its entirety. They have stated that a false case has been filed against them. In addition to the above, they have also stated that on 3.6.1998 both of them in company of a third person Rajeshkumar Shah were going from Indore to Kanpur in bus No. MP 09 2201. A-2, Raju Rajpal was standing for passing urine near BNP Police Station. A police constable arrested him because he was under intoxication. A-1, Atulkumar Vajpai had gone to rescue him and he was also arrested. Rajeshkumar Shah had given the luggages of both the accused persons to their family members and informed them about their arrest. It is stated that no muddamal has been seized from them, they have been falsely entrapped in the case, they are innocent and they have been acquitted by the learned JMFC, Devas in the case filed against them for the offences under Sections 25 and 27 of the Arms Act by judgment and order dated 10.2.2000. However, they have neither produced any evidence nor did they examine any witness in support of their defence.

2.11. On appreciation, evaluation, analysis and scrutiny of the evidence on record, the trial court has come to the conclusion that the prosecution has successfully established the complicity of the accused for commission of the offences with which they were charged. On the basis of the circumstantial evidence it is also held that both the accused persons have shared common intention for the purpose of looting the taxi and, therefore, they have prepared false number plate and they have allured the deceased by giving taxi fare charges and misrepresented before him and kidnapped him and committed murder near village Baman and thereafter they threw away his dead body in the road side bushes and with a view to screening offences they tried to destroy the identity of the deceased by beating stones on his face. Thus, according to the trial court, the accused has committed brutal murder. On the aforesaid finding, the trial court has convicted the accused for the offences of kidnapping as well as murder punishable under Section 302 IPC

read with Section 34 IPC and sentenced to suffer imprisonment for various terms to which reference is made in earlier paragraphs of this judgment which has given rise to these two appeals at the instance of original accused Nos.1 and 2.

3. Original accused No.1, Atulkumar Vikaschandra Vajpai, filed Criminal Appeal No. 1194 of 2004 through Mr. SV Raju, learned advocate whereas original accused No.2 Raju alias Rajpal Babulal Yadav, has filed Criminal Appeal No. 1222 of 2004 through jail and requested for rendering him free legal aid. Upon the request made by A-2, Raju alias Rajpal, he has been rendered legal assistance by this Court and Ms. Sadhna Sagar has been appointed to assist him. Mr. SV Raju, learned advocate has withdrawn his appearance from Criminal Appeal No.1194 of 2004 filed by A-1, Atulkumar Vikaschandra Vajpai. Since Mr. Raju has withdrawn his appearance, upon request of A-1, Atulkumar he has also been given the legal assistance through Ms. Sadhna Sagar and thus for both the accused persons, Ms. Sadhna Sagar has

appeared and argued the matters.

4. Ms. Sadhna Sagar, learned advocate for the accused, in support of the appeals, has raised the following contentions:

(i) The trial court has convicted the accused for commission of the offences with which they were charged absolutely without any evidence on record. There is no eye witness to the incident.

(ii) She has even challenged the homicidal death of deceased Mohmed Riyaz, as according to her, the dead body of the deceased Mohmed Riyaz was wrongly identified as it was in a very bad shape and, therefore, impossible to identify the same. She has contended that the post mortem examination has been carried out after two days of the death and the dead body was in such a decayed condition that most of the part of the body was liquefied which was borne out from the deposition of P.W.4, Dr. Jai Shah, the doctor who performed the autopsy.

(iii) She has also pointed out that the whole case is based on circumstantial evidence and to prove the case on the basis of the circumstantial evidence each and every circumstance has to be proved against the accused beyond reasonable doubt which would unerringly lead to the conclusion that the accused and the accused alone were the culprit.

(iv) According to her, there is no reliable, cogent and trustworthy evidence to establish that both the accused had hired the taxi of the deceased. The prosecution has tried to establish this fact by way of the evidence of P.W.3, Dineshchandra Chhotalal Modi, P.W.6, Mohmed Salim Ghulam Mohamad Shaikh, P.W.7, Majidkhan Ahmedkhan and P.W.10, Mohamad Shahi Ghulam Mohamad, who, according to the prosecution case, at the relevant time, were present at the taxi stand of Surat Railway Station and one of them was contacted by the accused. According to her, it was impossible for the above-named witnesses to

identify the accused. However, the trial court has wrongly believed the evidence of the above four witnesses to come to the conclusion that the accused had hired the taxi of the deceased and the deceased had taken both the accused in his taxi and thereafter the deceased was not seen alive and his dead body was found.

(v) It is also emphasized by her that evidence of P.W.1, Mohmed Firoz Noormohamad Shaikh, is a hear-say evidence as he has got the information from the police control room that the van of the deceased was seized at Devas and two persons have been arrested.

(vi) So far as the evidence of T.I. Parade is concerned, it is a fabricated one. As per prosecution case, four persons who were standing at the relevant time at the taxi stand outside Surat Railway Railway Station, have identified both the accused in presence of the panchas in T.I. Parade and the above named witnesses had an opportunity to see the accused persons prior to

T.I. Parade which was held by P.W.11, Bhanubhai Ratanbhai Patel, Executive Magistrate. Besides this, panch witness of TI parade P.W.13, Bilal Mohamad Miya Mohamad, is also residing in the same locality where deceased was residing and, therefore, he is interested witness and hence no reliance can be placed upon the testimony of P.W.13, Bilal Mohamad, who is a panch witness of TI Parade. According to her, all the witnesses of TI Parade were dummy persons.

(vi) Lastly it is submitted that so far as the evidence of P.W.23, Babulal Siddhanath Malvi, is concerned, it is also not free from doubt. According to her, merely finding both the accused in the Maruti Van that itself is not sufficient to hold that the accused are guilty of the offences with which they are charged.

The pith and substance of her submission centers around that the case is based on circumstantial evidence and the prosecution has failed to establish all the chains in sequence which would

lead to unerring conclusion that the accused is guilty of the offences with which they are charged. On the aforesaid premises, it is submitted by her that the impugned judgment and order of conviction and sentence deserves to be set aside by allowing the appeals and thereby acquitting both the accused of the offences with which they are charged. She, therefore, urged to allow the appeals.

5. In counter submission, Mr. AJ Desai, learned APP for the respondent – State of Gujarat, has submitted that the impugned judgment and order is just and proper and does not require interference of this Court. The prosecution has successfully established that Mohmed Riyaz has died a homicidal death by examining P.W.4, Dr. Jai Shah, who performed the post mortem examination on the dead body of Mohmed Riyaz and there was no question of wrong identification of the dead body. On the basis of the clinching evidence on record, the prosecution has established the guilt of the accused and all the links of the

circumstantial evidence that the two accused persons had hired the taxi of the deceased from taxi stand of Surat Railway Station and thereafter the dead body of Mohmed Riyaz was found on the side of the National Highway near Karjan and the Maruti Van was found with the accused which was having a fictitious number plate and the original number plate was found hidden underneath the seat of the van and also found bloodstained clothes and knife. The prosecution has also proved that both the accused had hired taxi of the deceased and the four witnesses named above were also standing at the relevant time at the taxi stand and they were also searching for customers. All the four witnesses have also identified the accused in TI Parade and Maruti Van of the accused has also been identified by the brother of the deceased and, therefore, the prosecution has established all the links of the circumstantial evidence which would lead to the conclusion of the guilt of the accused and the chain is so complete that there is no escape from the conclusion that

within all human probability the crime was committed by the accused and none else and the prosecution has also established that the circumstances pointed out by the prosecution are incapable of explanation of any other hypothesis than that of the guilt of the accused and there is no proper explanation coming forth from the accused as to how, why and under what circumstance the Maruti Van of the deceased has come in their possession. In the above premises, it is submitted by him that the impugned judgment and order of conviction and sentence passed by the trial court is based on circumstantial evidence which are cogent, reliable and trustworthy, and they rule out the reasonable possibility of innocence of the accused and, therefore, according to him, interference of this Court in the impugned judgment and order is not called for. Therefore, he has submitted that the appeals lack merit and deserve to be dismissed by confirming the judgment and order of conviction and sentence passed by the trial court. He, therefore, urged to dismiss the appeals.

6. This Court has considered the submissions advanced by Ms. Sadhna Sagar, learned advocate of the accused and Mr. A.J. Desai, learned APP for the State of Gujarat at length and in great detail. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and re-read by the learned advocates for the parties with reference to broad and reasonable probabilities of the case. In light of caution sounded by the Supreme Court while dealing with the cases in which sentence of imprisonment for life is imposed on the accused on the basis of circumstantial evidence, this Court has examined the entire evidence on record for itself independently of the trial Court and examined arguments advanced on behalf of the accused and infirmities pressed, scrupulously with a view to find out as to whether it was the accused and none else who have committed the offences as alleged against them. We have also gone through the documents which are on record

and forming part of the paper book.

7. At the outset, be it noted that so far as the instant case is concerned, there is no eye witness to the incident of killing the deceased as well as committing robbery and dacoity of the Maruti Van with an intention to kill the accused. The whole case of the prosecution has rested on the circumstantial evidence.

8. It is settled principle of law that in order to sustain conviction on the basis of circumstantial evidence, prosecution must fulfill three conditions:

(a) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

(b) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

(c) the circumstances, taken cumulatively, should form a chain so complete that there is

> no escape from the conclusion that within all human probability the crime was committed by the Accused and none else, and it should also be incapable of explanation of any other hypothesis than that of the guilt of the accused. Further, in cases depending largely upon circumstantial evidence there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however so strong cannot be allowed to take the place of proof. The court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof. The Court must satisfy itself that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused.

The above principles are laid down by the Supreme Court in the case of Jaharlal Das v. State of

Orissa AIR 1991 SC 1388.

9. It is also one of the settled principles of law that witnesses may tell lies but not circumstances. The Court must adopt cautious approach for basing conviction on circumstantial evidence. The Supreme Court has reiterated it in the case of State of Haryana v. Ved Prakash, AIR 1994 SC 468.

10. The Supreme Court in the case of Ramkumar Madhusudan Pathak v. State of Gujarat, (1998) 7 SCC 702 has aptly and elaborately laid down the principles as to which are the circumstances establishing guilt of the accused.

11. The Supreme Court in the very well known case of Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622, has laid down following five principles to base conviction on the circumstantial evidence:

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established;

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved, and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the Accused.

12. In the case of Jaipal v. State of Haryana, (2003) 1 SCC 169, the Supreme Court has held that merely because the accused could have had a motive for causing death of the deceased it would not by itself be enough to sustain the finding of guilt against him.

13. In the latest decision of the Supreme Court in the case of Swamy Shraddananda alias Murali Manohar Mishra v. State of Karnataka, 2007 AIR SCW 4513, the Supreme Court has said that law in this behalf is no more res-integra and also reiterated the five principles enunciated by the Supreme Court in its previous decision in the case of Sharad Birdhichand Sarda (supra) to base conviction on circumstantial evidence.

14. Keeping in forefront the aforesaid principles elucidated by the Supreme Court, we may now advert to the evidence adduced by the prosecution to find out whether the prosecution has successfully established the chain of evidence to base conviction on the basis of the

circumstantial evidence adduced by it.

15. To prove the case against the accused, on the basis of circumstantial circumstances, the prosecution has pitted the following circumstances against the accused:

(i) The deceased Mohmed Riyaz died a homicidal death. His dead body was found in a decayed condition, in the bushes on the side of the National Highway No.8 passing through Karjan, after two days after he left Surat, which was identified by his close relatives.

(ii) Both the accused had hired the taxi of the deceased on 1.6.1998 between 11.00 and 11.30 A.M. from near Surat Railway Station and they boarded the same and thereafter left Surat with the deceased in presence of four witnesses who are also doing the business of running taxi at the taxi stand at Surat Railway Station and also identified both the accused in TI Parade.

(iii) Both the accused were intercepted with the Maruti Van at Devas by P.W.23, Babulal Siddhanath Malvi, a home guard on duty at Devas in a suspicious condition as there was no number plate on the back side of the taxi. After interception they were searched and the original number plates as well as clothes having bloodstains were found from the taxi. Both the accused were arrested. The Maruti Van was identified by the complainant as that of the deceased.

(iv) No plausible explanation has been put forward by the accused as to under what circumstances they came in possession of Maruti Van belonging to the deceased nor did they give any explanation as to whether the deceased had alighted from the Maruti Van in living condition after they boarded the taxi.

(v) There was a motive on the part of the accused to loot the Maruti Van and in doing so they have killed the accused and thereafter they ran away

with the Maruti Van after changing the number plate.

16. To establish the aforementioned circumstances, the prosecution has mainly relied upon the evidence of P.W.4, Dr. Jai Arvindbhai Shah; P.W.1, Mohmed Firoz Noormohamad Shaikh, the brother of the deceased and complainant; P.W.3, Dineshchandra Chhotalal Modi, taxi driver; P.W.6, Mohmed Salim Ghulam Mohamad Shaikh, taxi driver; P.W.7, Majidkhan Ahmedkhan, taxi driver; P.W.10, Mohamad Shahi Ghulam Mohamad, taxi driver; P.W.11, Bhanubhai Ratanbhai Patel, Executive Magistrate, who conducted TI Parade, P.W.13, Bilal Mohamad Miya Mohamad, a panch witness of TI Parade and P.W.23, Babulal Siddhanath Malvi, a Home Guard at Devas.

17. To prove that the deceased died a homicidal death, the prosecution has examined and relied upon the oral testimony of P.W.4, Dr. Jai Arvindbhai Shah, Medical Officer, CHC, Karjan, Ex.32. He has performed the post mortem on the

dead body of Mohmed Riyaz on 4.6.1998 at CHC Karjan. He has also issued post mortem report which is at Ex.33 wherein he has noted the following external injuries:

(i) Oblique c/w just above left eye brow of around 3x2x0.5 cm.

(ii) Lt. hand amputated at wrist.

(iii) Amputation of 4th and 5th fingers of right hand at metacarpophalanseal joint and 3rd fingers amputated at terminal phalanx.

So far as the cause of death of deceased is concerned, in his opinion, it was because of cardio respiratory arrest due to haemorrhagic shock due to cutting of blood vessels at left wrist.

17.1 On a conjoint reading of the oral testimony of P.W.4, Dr. Jai Shah, Ex.32 and post mortem report at Ex.33, it is true that the dead body was in a decayed condition as the death was caused prior to 2 to 3 days. There was swelling on the dead body. Mouth was semi open, tongue protruded, faced was deformed. There was crush

injury on the face. However, the fact remains that the deceased died because of amputation of 4th and 5th fingers of right hand at metacarpophalangeal joint and 3rd fingers amputated at terminal phalanx as well as due to cutting of blood vessels at left wrist. However, it was not impossible for P.W.1 to identify the dead body and the same was thereafter identified by P.W.1 whose evidence we will discuss hereafter. Therefore, the prosecution has proved beyond reasonable doubt that the deceased died a homicidal death and the trial court is right in coming to the conclusion that the deceased died a homicidal death and we therefore affirm the said finding.

18. The prosecution has thereafter examined and relied upon the evidence of P.W.1, Mohmed Firoz Noormohamad Shaikh, Ex.26. In his deposition, he has, inter alia testified that he was residing at Nanpura Market along with his brothers Mohmed Riyaz and Mohamad Farukh. His elder brother Mohmed Rafiq was living separately.

His brother Mohmed Riyaz used to drive a taxi on rental basis. The colour of his brother Riyaz's taxi was white and its number was GJ 5 U 9969. The taxi was a Maruti Van.

18.1. He has further deposed that on 1.6.1998 in the morning at 8:00 to 8:30 his brother Riyaz had gone to the Railway Station to drive around his taxi on hire basis. He has further deposed that for the purpose of carrying on his business his brother always used to go to the Railway Station in the morning and stand at the taxi stand at the railway station and used to take the passengers wherever they asked him to take them. His brother used to return home by 9 O' clock at night everyday. But on 1.6.1998 his brother did not return by 9 O' clock at night. If his brother Mohned Riyaz was to come home late or if he was to return on the next day, he would make a telephone call at his brother-in-law Mohmed Afzal Ghulam Mohamad Shaikh's place and inform them. On 1.6.1998, his brother had not returned home by 9 O' clock at night and he had also not informed

them on telephone that he would be coming late or that he would return on the next day.

18.2. He has further deposed that on the next day he and his father as well as people from the locality were searching for Mohmed Riyaz. Thereafter at 8 to 9:30 at night he went and inquired about his brother from one Mohmed Salim Ghulam Mohamad Shaikh, a resident of their locality, who used to hire out his taxi and used to stand at the railway station with his taxi and he informed him that on the previous day, that is, on 1.6.1998 between 11.00 and 11:30 in the fore-noon two passengers had come to him and talked to him about the fare and they had said that they wanted to go from the station to Kribhco and from Kribhco to Baroda and return to Surat on the next day. As the taxi fare stated by him appeared to be high to those two passengers the said two passengers had gone to Mohmed Riyaz and had gone in his taxi towards Delhi Gate. From the talk with Salimbhai they had come to know that his brother Riyaz had gone to Baroda.

18.3. He has further deposed that on 3.6.1998 at about 12 to 12:30 P.M. his father had lodged a Janva Jog Entry with the Mahidharpura Police Station regarding his brother. Thereafter on 3.6.1998 at 3.30 in the afternoon, one Police Constable from the Athwa Police Station had come near his house and had told them that two persons had been apprehended with a Maruti Van at B.N.P. (Devas) Police Station and the number of the Maruti Van was GJ.5.U.9969. The Police Constable had informed them that the names of the two persons who had been apprehended were Atulkumar Vikaschandra Vajpai and Rajgopal alias Rajubhai Babulal Jadav. Thereafter he and Afzalbhai and his third relative Bilalbhai Master had gone to the police control room. When they reached the Police Control Room they learnt that the vehicle had been apprehended at Devas with the RTO book. At the Police Control Room he had asked the officer as to where his brother was and hence the police officer at the Control Room made a phone call to Devas Police Station and asked them as to

where Mohmed Riyaz was. Therefore, the officers at the Devas Police Station had asked the two apprehended accused regarding the whereabouts of Mohmed Riyaz. Thereafter the police officer from Devas Police Station had informed the Surat Police Control Room that Mohmed Riyaz had been murdered near Karjan ahead of Baroda and both the accused had robbed the car and fled, whom they have arrested. He had lodged a complaint in connection with this incident at Mahidharpura Police Station. He has identified his signature in the FIR Ex.27 and has admitted its contents.

18.4. He has further deposed that after lodging the complaint on 3.6.198, on 4.6.1998 at 12 O'clock in the afternoon a police constable had come from Mahidharpura Police Station and informed him that ahead of Miyagam Karjan there was a village called Baman where opposite Modern Petro Chemicals Company towards the west at a distance of approximately 20 feet, a corpse has been found. Therefore, he, his elder brother Mohmed Rafiq, his other relatives namely, Mohmed

Salim Ghulam Mohamad Shaikh, etc., had gone to Baman village. After going there, his elder brother Mohmed Rafiq Noormohamad Shaikh had identified the dead body, which was his brother Mohmed Riyaz's dead body. Two to three fingers of his brother Mohmed Riyaz's right hand were cut. He had seen his brother's dead body. The wrist of his brother's left hand had been amputated. A large metal rock was lying at a distance of two feet from his brother's dead body, on which there were dried bloodstains. His brother's dead body had decayed. A knife was lying at a distance of two to four feet from his brother's dead body. The post mortem examination of his brother's dead body was carried out on the spot and the police had seized the knife and metal. Thereafter on 4.6.1998 they had taken his brother's dead body and buried him at 12 O'clock at night at Surat. His brother's Maruti Van had been seized by the Devas Police Station. After he had lodged the complaint the police had recorded his further statement on 7.6.1998.

18.5. He has identified the muddamal knife as the knife, which was lying at a distance of 2 to 4 feet from his brother's dead body. He has also identified the metal rock as well as the pieces of shirt being muddamal article No.4.

18.6. It may be noted that this witness was cross-examined at length. Lot many suggestions were put to him that it was not the dead body of his brother who was driving taxi that he had identified as that of his brother's dead body. He has repeated that he had himself gone to collect the dead body of his brother and he has also stated that his father and brother had also gone to the place where the dead body of his brother was lying. In his cross examination he has also stated that Ahmed Aslam Ghulam Mohamad Shaikh and Pirmahmad Ghulam Mahamad Shaikh, etc., had gone to Devas for collecting Maruti Van of his brother and they had returned on 5.6.1998. He has identified the Maruti Van which was belonging to his brother. He has also taken possession of the Maruti Van from the court. In sum and substance

he has withstood the test of cross-examination.

18.7. On overall reappreciation of the evidence of this witness, it is seen that he came to know from 4 persons who are running taxi and standing in the taxi stand near Surat Railway Station that on 1.6.1998 the deceased had gone to Baroda with two passengers. Those four persons have also seen the two passengers as out of the four persons, one person was contacted by the two persons but as the fare was not struck they had hired the taxi of the deceased. His father has also given a Janva Jog complaint on 3.6.1998 as the deceased has not returned upto 3.6.1998 and thereafter he came to know that two persons were caught at Devas with Maruti Van bearing registration No. GJ.5.U. 9969. He also came to know about the name of two persons and they were Atulkumar Vikaschandra Vajpai and Raju alias Rajpal Babulal Yadav.

19. To prove the fact that the accused hired the taxi of the deceased in presence of four

persons, the prosecution has firstly examined P.W.3, Dineshchandra Chhotalal Modi, Ex.30. He has, inter alia, testified that he was working as a taxi driver since nine to ten years prior to the date of recording of his evidence. He owned the taxi and its number was GJ.5.U.8632. He has further deposed that everyday in the morning at about 5:30 to 6:00 he used to leave his home and go to the Swaminarayan temple and after darshan he would come at the Railway Station Taxi Stand by 06:30 to 07:00 hours.

19.1. He has further deposed that on 1.6.1998 he had reached the taxi stand at the railway station at 6:00 in the morning. Other taxis were standing along with his taxi. After leaving two vehicles behind his taxi, Taxi-driver Salim was standing with his taxi and on the left side of his taxi after leaving one taxi Majidkhan was standing with his taxi. Totally about 30-40 taxi drivers were standing there with their taxis. Between 11:00 to 11:30 in the morning two persons had come to hire a taxi and had gone to

Salimbhai's taxi, but as they could not afford the fare asked by Salimbhai they had gone ahead towards Mohmed Riyaz and had fixed the fare with Mohmed Riyaz and boarded his taxi. His taxi was at a distance of ten cars from Mohmed Riyaz's taxi and he did not know where he was taking the passengers. Mohmed Riyaz had got into the taxi and gone towards Delhi Gate. He has further deposed that he had seen the two passengers and could even recognize them at the time when his deposition was being recorded. He has identified both the passengers as the accused who were present in the court. He has also deposed that both the passengers left Salimbhai after talking to him and that he was watching them as he expected them to come to him, therefore, he was in a position to recognize them. Thereafter on the third day he got the news that after he had taken the two passengers who had hired his taxi, Mohamed Riyaz has not yet returned. In the evening he got the news that his family members are looking for Mohmed Riyaz. Thereafter on the next day, on the basis of the information

received from Mahidharpura Police Station, the drivers were talking amongst themselves that Mohmed Riyaz's vehicle was lying at Devas Police Station and Riyaz is not in the taxi. In the evening they got the news that Mohmed Riyaz has been murdered. Subsequently he had read in the newspaper that the passengers whom Mohmed Riyaz had taken in his taxi had committed his murder and fled with his taxi. The two passengers who have run away with Mohmed Riyaz's taxi have been apprehended at the Devas Police Station. He has also deposed that the number plate of Mohmed Riyaz's taxi is GU.5.U.9969 and it is a Maruti Van.

19.2. He has further deposed that on 6.6.1998 he was called at the Killa (Fort) as a witness for the Test Identification Parade. He, Salimbhai, Majidbhai and Sajidbhai had been made to sit in the room next to that of the Executive Magistrate. Thereafter, after some time, Bilalbhai had come to call him and had taken him for the identification parade in the chamber of

the Executive Magistrate. When he went there, there were about 15 persons standing in the chamber of the Executive Magistrate and the Executive Magistrate had told him that if he could identify the accused from the persons standing in the line, he should identify them. Thereafter he had identified both the accused. From the persons standing in the line he had caught the persons standing between serial number two and three in the line by his hand and pulled him out, whose name as disclosed by the Executive Magistrate was Raju. Thereafter he had caught the hand of the person standing between serial No.14 and 15 and pulled him out and the Executive Magistrate informed that his name was Atul. This witness has also deposed that on 5.6.1998 the police had called him at Mahidharpura Police Station and recorded his statement in connection with the incident.

20. Thereafter the prosecution has examined and relied upon the evidence of P.W.6, Mohmed Salim Ghulam Mohamad Shaikh, Ex.37. He has, inter

alia, testified that he was residing at Nanpura Market with his family and used to drive a taxi. The registration number of his taxi was GJ.5.Y.9607, which was a Maruti Van. He used to drive the taxi on hire basis and used to stand at the Railway Station. He would go to the Railway Station Taxi Stand at 8:00 in the morning and if his taxi was hired for going out of station then there was no fixed time for returning home. He has deposed that he knew Mahamad Riyaz who was carrying on the business of driving a taxi. The number of Mohmed Riyaz's taxi was GJ.5.U.9969. On 1.6.1998 he had reached the taxi stand at the Railway Station at his usual time and Mohmed Riyaz was waiting at the taxi stand with his taxi that was four to five cars behind his taxi. While he was waiting, two passengers came to hire his taxi at about 11:00 to 11:30 in the morning. Both the passengers had told him that they wanted to go to Hazira Kribhco and wanted to go to Vadodara in the evening and as their master was seriously ill at Vadodara they had to come back with him from Vadodara to Surat at 9:00 in the morning. As

the passengers found Rs.2500 to be on the higher side they went away and had gone to Mohamed Riyaz to take his taxi on hire. After hiring Mohmed Riyaz's taxi they had boarded the taxi and had departed from the taxi stand. He has deposed that Dineshbhai's taxi was parked towards the south from the place where his taxi was parked, that is, towards Delhi Gate. Out of the two passengers who had come to hire his taxi one was slim and the other was strongly built. He has deposed that he can recognize the two passengers even today (the day when his evidence was recored). He has further deposed that as they take passengers to and fro they can recognize them. He has also identified the accused as the persons who had come to take his taxi on hire. He has also deposed that after Mohmed Riyaz was murdered he had been called for identifying both the accused during the test identification parade proceedings and he had identified both the accused during the said proceedings. He has further deposed that during the course of the test identification parade proceedings he had been called in the room

of the Executive Magistrate at the Killa on 6.6.1998. When he went into the Magistrate's room there was a line of about fifteen persons. He was standing in the room next to that of the Executive Magistrate. From there Siddiquebhai had come to call him and after entering the Executive Magistrate's room the Executive Magistrate told him that if he could identify the accused he should identify them. Thereafter he went around the line and pulled out Raju who was standing between Serial No.3 and 4 by catching his hand and pulled Atul who was standing between serial No.14 and 15 out by catching hold of his hand. After he had identified both the accused the Executive Magistrate had let him go.

20.1. He has further deposed that after Mohmed Riyaz had taken both the accused as passengers in his taxi, on 3.6.1998 Mohmed Firoz had asked him the whereabouts of his brother whereupon he had informed Mohmed Firoz that two persons who wanted to go to Hazira had come to his brother and he had taken both the passengers and gone to Hazira

Road. That the passengers had said that they would go from Hazira to Vadodara and on the next day they would return to Surat from Vadodara by nine in the morning. On 3.6.1998, in the evening, Mohmed Firoz told him that Mohmed Riyaz has been murdered and thrown out at a distance of 22 kms. from Vadodara towards Bharuch and that two passengers have been apprehended with Mohmed Riyaz's vehicle at Devas Police Station. On 3.6.1998 the police had called him to Mahidharpura Police Station for recording his statement and he had given his statement before the police. He has identified the accused sitting at Serial No.1 in the courtroom as Atul and the one sitting at Serial No.2 as Raju.

21. The prosecution has thereafter examined and relied upon the evidence of P.W.7, Majidbhai Khan Ahmedkhan Ex.38. He has, inter alia, deposed that he stands opposite the Sardar Patel Statue at the Station Road with his taxi daily. If he gets passengers he would take the passengers to the concerned place. On 1.6.1998 he had come to the

taxi stand, opposite the Railway Station at 7:00 in the morning and parked his taxi. Thereafter at about 11:00 to 11:15 in the morning the accused Raju and Atul had come to the taxi stand and had talked with Salimbhai, the owner of the taxi standing first in the line. However, as they could not agree with Salimbhai regarding the hire charges, they had both gone to Riyaz and talked with him. Thereafter both of them boarded Riyaz's taxi and went towards Delhi Gate. Thereafter on 3.6.1998 he had received the news that Riyaz has not yet returned home and his family members are searching for him. Thereafter on 4.6.1998 the police had recorded his statement. On 6.6.1998 he had been called at the Killa (Fort) for the purpose of identifying the accused. He had identified the accused in the Test Identification Parade proceeding. He has identified the accused who were present in the Court as Raju and Atul. He has further deposed that in the TI Parade proceedings Raju was standing between No.2 and 3 and Atul was standing between 7 and 8. He has identified the person sitting first in the court

as Raju and the other as Atul. He has further deposed that he came to know the names of both the accused during the course of the TI Parade. He has further deposed that on 5.6.1998 he had come to know that both these accused had killed Riyaz and gone away with his taxi.

22. The prosecution has thereafter examined and relied upon the evidence of P.W.10, Mohamad Shahi Ghulam Mohamad, Ex.45. He has, inter alia, testified that he had been called at the Killa (Fort) by the Magistrate on the 4th or 6th at about 4:00 in the evening. There were three other witnesses with him at the Fort. Majidbhai, Salimbhai and Dineshbhai were present there. At the Fort they four witnesses were made to sit in the next room. First Salimbhai was called inside, thereafter he was called and after calling him inside he was asked to identify the accused. He had identified the two accused in the TI Parade. They are the two accused who are present in the court. Accused Atul was standing between number eight and nine in the line and Raju was standing

between four and five in the line. After he had identified the accused, he had been permitted to leave and hence he had left. He has further deposed that he used to stand opposite the Sardar Patel statue with his taxi almost everyday. On 1.6.1998 both the accused had come to Salimbhai. But as they could not agree on the question of hire charges with Salimbhai, both the accused had come to Mohamed Riyaz. The accused had taken Mohmed Riyaz with them after telling him that firstly they had to go to Kribhco and thereafter to Vadodara and on the next day they would return to Surat. He has further deposed that he did not remember what sort of clothes the accused were wearing at the relevant time. He has further deposed that until two days after they had taken Mohmed Riyaz's taxi, Mohmed Riyaz had not returned and hence his family members were searching for him. News had been received from the control room that after robbing and killing Mohmed Riyaz both the accused in the present case had taken his taxi and gone away. He had heard from members of Mohmed Riyaz's family that Mohmed

Riyaz's dead body is lying between Bharuch and Baroda near Karjan. At the time he did not know the names of the accused. He had come to know the names of the accused when he had been called for the TI Parade at the Fort. He has further deposed that as on date he can identify the accused. He has identified the first accused as Atul and the second one as Raju in the Court. He has further deposed that the persons who had taken Mohmed Riyaz's taxi on hire are the same two persons who are present as the accused in the Court. He has also deposed that the police had recorded his statement on 4.6.1998.

23. It may be noted that all the above four witnesses were cross-examined at length. Lot many suggestions were put to them as to how they could remember the face of the accused because out of four, three were not contacted and only one was contacted by the accused. Suggestions were also put to them how they could identify the accused in TI Parade and also to the effect that prior to TI Parade they were shown the accused persons to

whom they have to identify. They have repelled the suggestions put to them and they stuck to the same version that when the accused hired the taxi of the accused they were present in the taxi stand and they have very much seen the accused persons when they fixed the fare with Mohmed Riyaz and they wanted the vehicle first to be taken to Kribhco and thereafter to Baroda with an understanding that they were to return on the next day again to Surat. In TI Parade also they have identified the accused in presence of the panch witness as well as the Executive Magistrate. Therefore, according to us, their evidence is trustworthy and they have no reason to falsely rope in the accused persons in the serious crime and, therefore, their evidence inspires confidence.

24. To prove that in the TI Parade four persons have identified the accused persons, the prosecution has examined and relied upon the evidence of P.W.11, Bhanubhai Ratanbhai Patel, Ex.46. He has, inter alia, deposed that on

6.6.1998 at 10 O' clock in the morning he had received a letter for carrying out Test Identification Parade of the accused in connection with the Mahidharpura Police Station C.R. No.I-234/98. Accordingly it was decided to hold the TI Parade at 15:00 hours on 6.6.1998 and the Mahidharpura Police Station was informed regarding the same on 6.6.1998 and the Police Inspector was told that as the accused were in police custody they should be brought in such a manner that the complainant and other witnesses cannot see them. He has produced the yadi vide Ex.47. He has further deposed that pursuant to the yadi he had written a letter to the police Inspector of the Mahidharpura Police Station wherein he had stated the date for holding TI Parade and asked him to keep the accused present. He has stated that the letter is in his handwriting and the same is produced vide Ex.48.

24.1. He has further deposed that as the TI Parade had been kept in his office at 15:30 hours on 6.6.1998, accused No.1 Raju @ Rajpal and

Atulkumar @ Shubul had been brought there. Upon the accused being presented before him by PSI JM Patel and members of his staff at 15:45 hours, he had made them sit in the adjoining room. Thereafter at 16:15 hours, upon the complainant and witnesses remaining present, they were made to sit in the Mid-day meal room in the office of the Choriyasi Mamlatdar's Office. The complainant and the witnesses were (1) Mohmed Salim, (2) Mohamad Sahid, (3) Majidkhan and (4) Dinesh Chhotalal Modi. The accused and the witnesses were made to sit in distant rooms so as to ensure that the witnesses could not see the accused. The identification parade was started at 16:15 hours. The Test Identification Parade proceedings were carried out in the presence of two reputed persons, Siddiquebhai Valibhai and Vilas Mohamed Miya Mohamed Master. During the identification parade proceedings, keeping in view the age of the accused, their height, identification marks on the face, 15 individuals were made to stand in a line in his room. Thereafter upon asking the entire staff of the

Mahidharpura Police Station to go out of his room, they had left the room. The doors and windows of his room were closed. Thereafter the accused who were made to sit in the adjoining room were called and they were made conversant with TI Parade and were informed that both the accused could change their clothes as well as their hairstyles if they so desired. However, both the accused declined to change their clothes or hairstyles. Thereafter both the accused were asked to stand at the place of their choice in the line. At the first time, Raju @ Rajpal had stood between serial No.3 and 4 and Atulkumar had stood between serial No.11 and 12. Thereafter the Panch No.1 Siddiquebhai was asked to call Mohamed Salim who was sitting in the Mid-day meal room and hence he has called him and he was made conversant with IT Parade proceedings. Mohamed Salim had been told that the two accused in this case are standing in the line if could recognize them he should identify them and bring them out by holding their hand and produce them before him. Upon asking him to do so he had carefully

looked at the persons standing in the line and identified the accused and produced them before him. Upon asking the names of the two accused who had been identified by Mohamed Salim they had said that their names were Raju @ Rajpal and Atulkumar. Thereafter Mohamed Salim was asked to leave the identification parade place and accordingly he had gone out.

24.2. He has further deposed that thereafter both the accused were again told that if they desired to change their clothes they could do so as well as they could change their hairstyles, however, they declined to change either their clothes or their hairstyles. Upon asking both the accused to stand at the place of their choice, Raju @ Rajpal had stood between serial No.8 and 9 and Atul had stood between serial No.4 and 5. Thereafter panch Bilalbhai Mohamed was asked to call witness Mohamed Sahid from the Mid-day meal room and hence he had called Mohamed Sahid to his chamber. On his coming there, he was made conversant with the identification parade

proceedings and was informed that the two accused are standing in the line if he knew them he should identify them. Thereafter Mohamed Sahid had gone around the line and taken out both the accused from the line and on asking the accused their names they had stated their names to be Raju and Atulkumar. Thereafter witness Mohamed Sahid was asked to leave the room and hence he had gone out.

24.3. He has further deposed that thereafter for the purpose of identification of the accused by the third witness, the accused were again informed that they could change their clothes or their hairstyles if they so desired, however, both the accused had declined to change either their clothes or their hairstyles. Thereafter upon telling both the accused to stand at the place of their choice in the line, accused Raju @ Rajpal had stood between Serial No.7 and 9 and accused Atul had stood between serial No.2 and 3. Thereafter out of the witnesses sitting in the Mid-day meal room, the panch witness Siddiquebhai

was asked to call witness Majidkhan and accordingly he had called Majidkhan who was then made conversant with the test identification proceedings. Thereafter he was told that if could recognize the two accused standing in the line he should identify them and hold their hand and bring them out, whereupon witness Majidkhan looked carefully and identified both the accused and brought them out of the line by holding them by their hands. Upon asking them their names they had stated their names to be Raju alias Rajpal and Atulkumar. Thereafter upon asking the witness to leave the room, he had left the room.

24.4. He has further testified that thereafter as the accused were to be identified by the fourth witness, they were informed that they could change their clothes or their hairstyles if they so desired, however, they had declined to either change their clothes or their hairstyles. Thereafter they were asked to stand at the place of their choice in the line whereupon accused Raju alias Rajpal stood between serial No.2 and

3 and accused Atul stood between serial No.14 and 15. Thereafter panch witness Bilalbhai was asked to call witness Dineshbhai Chhotalal Modi from the witnesses sitting in the Mid-day meal room whereupon he had called Dinesh Chhotalal Modi, who was made conversant with the TI Parade proceedings. He was then told that the accused are standing in the line and if he knew them he should identify them and bring them out. Dineshbhai Chhotalal Modi had minutely looked at the line and identified both the accused and produced them by catching their hands, whereupon on asking their names they had said that their names were Raju alias Rajpal and Atulkumar. Thereafter the witness was asked to leave the room and hence he had gone out.

24.5. He has further testified that thereafter the 15 persons called for the test identification parade were asked to go out of the room and hence they had gone out. The test identification proceedings were concluded at 17:15 hours. He has further deposed that detailed panchnama in that

regard had been prepared by him in his own handwriting. He has further deposed that he is producing the original panchnama vide Ex.49, which bears his signature and is in his own handwriting. He has stated that both the panchas had signed the same in his presence and that the contents of the panchnama are true. He has further deposed that a copy of the panchnama had been given to the police at the relevant time which has been produced vide Mark 19/14. He has deposed that Raju and Atulkumar are the persons sitting in the court as the accused.

24.6. In cross-examination, so many suggestions were put to him that prior to TI Parade he has given opportunity to the four persons who have identified the accused in the TI Parade to see them and that the TI Parade was merely an empty formality. He has repelled the said suggestions and reiterated that the sequence of the accused in the line were changed while TI Parade by each witness was carried out and the accused were not allowed to stand at one place in

the line and the sequence was changed from witness to witness. However, the witnesses have identified them as the accused who had hired the taxi of Mohmed Riyaz.

24.7. In sum and substance, his evidence is also not impeachable and it has been borne out that TI Parade was arranged as per the guidelines enunciated by the Supreme Court in catena of decisions with regard to holding of TI Parade and it was held as per the rules and regulations of the Police Manual.

25. The prosecution has thereafter examined and relied upon the evidence of P.W.13, Bilal Mohamad Miya Mohamed Ex.52. He has, inter alia, deposed that he had been called as a panch in the Test Identification Parade proceedings on 6.6.1998 in the office of the Executive Magistrate at 3:45 in the evening. The other panch with him was Siddiquebhai. The Executive Magistrate had explained to him that identification parade of two accused is to be carried out and the

witnesses who know the accused have been asked to sit in the next room, he should, therefore, call them when he asked him to do so. He and other panch were made to sit in the chamber of the Executive Magistrate and the other witnesses were made to sit in the Mid-day meal room. The accused were also in the Executive Magistrate's room. Apart from the accused, 15 persons had been called to stand in the line. The Executive Magistrate informed the accused that if they wanted to change their clothes they could do so and if they wanted to comb their head and change their hairstyles they could so so. Thereafter the accused were told by the Executive Magistrate to stand wherever they wanted to in the line. Thereafter Panch No.1 Siddiquebhai had been sent to call the identifying witness from the Mid-day meal room and Siddiquebhai had called Mohmed Salim to the chamber of the Executive Magistrate. Upon Mohamed Salim coming there, the Executive Magistrate has asked him to identify if the accused who had come to hire the taxi were there or not. Mohamed Salim had looked at the persons

standing in the line and had brought out one person and thereafter brought out another person. The name of the first person who was brought out was Raju Yadav and the name of the other person was Atul Vajpai. Thereafter the Executive Magistrate had asked Mohmed Salim to go out of the room. He has further deposed that after recording the proceedings, Mohamed Salim had been asked to leave the room. He has further deposed that thereafter the Executive Magistrate asked him to go to the adjoining room and call witness Mohamed Sahid and hence he had gone and called him. On his coming to the chamber of the Executive Magistrate Mohamed Sahid was told that if he can recognize the persons who had come to hire the taxi he should identify them. Thereafter Mohamed Sahid went around the line and pulled out both the accused in the present case. Both the persons were the same persons that Mohmed Salim had identified earlier. Thereafter the Executive Magistrate had recorded the proceedings and asked Mohamad Sahid to go out of the chamber. Thereafter the Executive Magistrate told the

accused that if they so desired they could still change their clothes and their hairstyles, however the accused had declined to either change their clothes or their hairstyles. However every time each of the accused was standing at a different serial number in the line. Thereafter the Executive Magistrate asked panch witness Siddiquebhai to call witness Majidkhan from the Mid-day meal room pursuant to which Siddiquebhai has called Majidkhan. Upon Majidkhan coming into the chamber, the Executive Magistrate told him to identify the two accused whom he knew. Majidkhan looked at the persons standing in the line and turn by turn took out two persons and identified them. Thereafter the Executive Magistrate had recorded the proceedings in that regard in writing and asked Majidkhan to leave the room. Thereafter the Executive Magistrate had asked him to call Dineshchandra Modi from the adjoining room and hence he had gone to the Mid- day meal room and called Dineshchandra Modi. Upon Dineshchandra Modi coming there, the Executive Magistrate had asked him that if he knew the two

accused he should identify them. Thereafter Dineshchandra Modi looked at the persons standing in the line and identified the two accused and brought them out. Thereafter the Executive Magistrate recorded the same in writing and permitted Dineshchandra Modi to leave. Thereafter the Executive Magistrate read over the proceedings recorded by him to both the panchas. He has categorically deposed that the identification parade proceedings had taken place in their presence and that his and the other panch's signature had been obtained on each page. He has deposed that the panchnama Ex.49 has been drawn in his presence and that the same bears his signature as well as that of the other panch. He has further deposed that the accused identified by the witnesses were present in the court and that the accused sitting at number one is Raju and at number two is Atul.

25.1. In cross examination a suggestion was made that he is residing at the same area where the deceased was residing and, therefore, he was

a selectee but he has repelled the said suggestion. According to us, he has stated in his evidence as per the evidence of four witnesses who have identified the accused as well as that of the Executive Magistrate. His evidence is in complete consonance with the evidence of the four witnesses who have identified the accused as well as that of the Executive Magistrate who held TI Parade. He has not exaggerated a single word. Therefore, merely because he is residing in the same area where the deceased was residing and, therefore, his evidence should be thrown overboard cannot be accepted. He is a witness whose oral testimony inspires confidence and cannot be impeached.

25.2. On reappraisal of his testimony it has to be held that during the TI Parade which was arranged in his presence, four witnesses have identified the accused as those four witnesses had seen the accused on 1.6.1998 when the accused had hired the taxi of Mohmed Riyaz at the taxi stand at Surat Railway Station.

26. The prosecution has thereafter examined and relied upon the evidence of P.W.23, Babulal Siddhanath Malvi, Ex.73. He has, inter alia, testified that he was discharging duties as a Home Guard since ten to eleven years and in the year 1998 he was discharging duties at the Thana Bank Note Press at Devas.

26.1. He has further deposed that on 3.6.1998, a general checking of vehicles was being carried out along with the police at National Highway. At that time he was standing near the Police Station and S.C.M. Shri Vikramsinh Rathod had told him to come with him for checking of vehicles. Along with them, Surajpalsinh, who is the Station Officer, has also proceeded for checking of vehicles.

26.2. He has further deposed that thereafter they had reached near the Bhopal Crossroads at a distance of two furlongs from the Police Station. At that time as they suspected one Maruti van, it

was stopped. The said car had a number plate in front but there was no number plate at the back. The number plate on the front side had the number D.L.2.9426. They had checked the said car. Raju alias Rajpal was driving the car. As the car has come near their thana and stood there, they had asked their names and addresses and on suspicion being raised they had checked the car. A 315 bore Tamancha was found from Raju and upon asking about the licence he had informed that he did not have a licence and hence the same was seized. There were two persons in the car. There was a suitcase which was with Raju and upon opening it addresses of Surat were found. He has further deposed that he cannot recall the name of the person who was sitting in the car with Raju. However, the said person is present with Raju as an accused in the court and he identifies both of them. From the suitcase, papers pertaining to Hotel Hariyali of Surat were found. Upon looking inside the bag which was with the other person, bloodstained clothes were found which consisted of a lungi, towel, shirt, pant, etc., and upon

searching the other person, a knife was found which was about 13 to 14 inches long. He has further deposed that he can identify the said muddamal. He has thereafter identified muddamal article No.6 as the same knife. He has also identified the muddamal – bloodstained clothes.

26.3. He has further deposed that possession of all the aforesaid muddamal had been taken over and the vehicle had been seized. He has further deposed that he cannot remember as to whether anything else was found from the vehicle. They had learnt that the real number of the car is G.J.5.U.9969 upon finding the number plate from underneath the seat of the vehicle afterwards. Upon finding the papers of the vehicle from the car and as they were of Gujarat, same were seized. He has further deposed that he still cannot remember the name of the other person. He has also deposed that a Japti Panchnama had been drawn in respect of the seized articles. He has thereafter informed that the name of the other person found in the vehicle was Atulkumar. He has

further deposed that the Japti Panchnama was drawn in his presence and the same bears his signature. He has also deposed that the police had also called one person from the public and the said person had signed in his presence, which he has identified. He has further deposed that he has signed as Panch No.2. He has produced the original panchnama vide Ex.74 and identified the signature of the accused Atulkumar on the same.

26.4. He had produced the arrest panchnama of accused No.1 Rajpal alias Raju vide Ex.75 and acknowledged his signature on the same. He has also identified the signature of the other panch on the same stating that the same has been signed in his presence.

26.5. He has produced the seizure memo of the articles seized from the accused Atulkumar vide Ex.76 stating that details thereof had been written and the panchnama had been prepared. He has acknowledged his signature as well as that of the panch on the said panchnama.

26.6. He has produced the seizure memo of the articles seized from accused Rajpalsingh vide Ex.77 stating that a panchnama had been drawn in respect of the articles seized from Rajpalsingh. He has also identified his own signature and that of the panch on the said seizure memo.

26.7. He has identified his signature and that of the panch on the seizure memo Ex.78 and stated that the articles had been seized from accused Rajpal under the said panchnama.

26.8. He has also deposed that S.O. Surajpalsinh had signed all these panchnamas in his presence and has identified his signatures on all the panchnamas from Ex.74 to Ex.78. He has deposed that the accused are present in the Court. He has further deposed that the police had recorded his statement and that on examining the vehicle bloodstains were found.

26.9. In his cross-examination, lot many

suggestions were put to him that he has arrested the accused as accused No.2 was under intoxication he was arrested and since accused No.1 has come to rescue accused No.2 he was also arrested. He has repelled all the suggestions and reiterated that he has intercepted the van near Bhopal crossroads, two furlongs away from the police station, as doubt was raised because the number plate was found only on the front of the vehicle and there was no number plate at the back. Thereafter, during the search, he recovered one tamancha from accused No.2 without licence and also a suitcase and upon opening the suitcase, addresses of Surat were found. He has also stated that the accused were frightened. A feeble attempt was also made to create a ground so as to see that the credibility of the evidence of this witness is doubtful, by contending that he has acted in dual capacity as he has also signed the panchnama as a panch in respect of recovery of muddamal tamancha. We do not find any substance or merit in the said submission. According to us, one witness can act in dual

capacity.

27. The prosecution has thereafter examined and relied upon the evidence of P.W.24, Kishorbhai Umedsinghbhai, ASI, Ex.79, who started the investigation pursuant to the 'janva jog' entry; P.W.25, Arjun Tulsiram Borse, PSI, Ex.80, who went to Kanpur and recorded statements of P.W.15, Manohar Kishanchand Nainani, Ex.55 and P.W.16, Satish Sahajarilal Chopra, Ex.56, who prepared the number plate of the vehicle; P.W.27, Bhupendra Jayantilal Kansara, PI, Mahidharpura, Ex.88, who went to Devas to get muddamal; P.W.28, Vishnubhai Ishwarbhai Patel, PSI, Athwa Police Station, Ex.89, who received message of dead body from CHC and informed relatives; P.W.29, Jayantilal Mafatlal Patel, PSI, Mahidharpura, Ex.90, who went to Devas by transfer warrant and brought the accused, articles and Maruti Van seized at Devas to Surat and P.W.30, Somabhai Babarbhai Ravat, P.I., Mahidharpura Police Station, Ex.91, who recorded FIR and was the Investigating Officer. The above are police

officers who have investigated the case and filed charge sheet against the accused persons.

27.1. On perusal of the evidence of the police officers it is seen that they have stated about the role played by them from the moment of recording of janva jog entry, recording of FIR and investigating the case till the filing of the charge sheet in the Court.

28. A feeble attempt was also made by the learned advocate of the accused that in this case there are two FIRs; one is janva jog entry registered at Mahidharpura Police Station on 3.6.1998 being Missing Register No.19 of 1998 and thereafter the dead body of deceased was found at the sim of Baman village at 6.00 a.m. and for that one FIR was lodged with Karjan Police station by one A.R. Choudhary Sr. Police Sub Inspector against some unknown persons. Last FIR was lodged for the same offence with Mahidharpura Police Station, Surat City being CR No.I-234 of 1998. Therefore it is evident that there are two FIRs for the same

offence and, therefore, the prosecution case does not inspire confidence. According to us, the aforesaid submission is absolutely meritless. A person who is running taxi when he goes out of Surat on a long trip on account of his business, generally returns after one or two days and, therefore, naturally his family members might inform the police station if he does not return within a day or two and, therefore, in instant case, since Mohmed Riyaz did not return on the next day and also did not inform any of his relatives as to when he is likely to return, a Janva Jog entry was made in the police station and thereafter the investigation was started. So far as the FIR lodged at Karjan Police Station is concerned, the Karjan Police never knew about the Janva Jog entry which had been made at Mahidharpura Police Station and, therefore, on finding the dead body near Baman village near National Highway, they also registered one FIR at Karjan Police Station. Thereafter since the accused were found with the Maruti Van belonging to deceased and as it has come in evidence that

the accused had murdered Mohmed Riyaz, FIR was registered at Mahidharpura Police Station giving all the details. Therefore, merely because there are two FIRs and one Janva Jog entry in different police stations, by that fact itself it cannot be said that the prosecution case suffers from infirmity and cannot be relied upon.

29. It is also required to be mentioned that no plausible explanation is put forward by the accused as to how they came in possession of the Maruti Van belonging to deceased when they have never claimed that they are the owners of the said Maruti Van. They have changed the number plates of the Maruti van belonged to the deceased and the original number plates were found from underneath the seat of the Maruti Van. After removing the original number plates, they have fitted a fictitious number plate in front of the Maruti van and on back they have not fitted any number plate. They have not given any explanation for this. It is not their case that after hiring the taxi and on reaching their destination, they

have relieved the taxi driver and thereafter they do not know anything about the taxi driver and, may be, the driver was killed by somebody else to take away the Maruti Van. Absence of any explanation by the accused would lead to an inference which would lead to a circumstance against the accused.

30. In this connection, it would be relevant to refer to the latest pronouncements of the Supreme Court in the case of Raj Kumar Prasad Tamarkar v. State of Bihar and another, 2007 (1) SCALE 19: JT 2007 (1) SC 239. In the said judgment, the Supreme Court has opined that:

> “Once the prosecution has been able to show that at the relevant time, the room and terrace were in exclusive occupation of the couple, the burden of proof lay upon the respondent to show under what circumstances death was caused to his wife. The onus was on him. He failed to discharge the same.”

This legal position would appear from a decision of the Supreme Court in Nika Ram v. The State of Himachal Pradesh, AIR 1972 SC 2077 wherein the Supreme Court has observed as under:

> "It is in the evidence of Girju PW that only the accused and Churi deceased resided in the house of the accused. To similar effect are the statements of Mani Ram (PW 8), who is the uncle of the accused, and Bhagat Ram school teacher (PW 16). According to Bhagat Ram, he saw the accused and the deceased together at their house on the day of occurrence. Mani Ram (PW 8) saw the accused at his house at 3 p.m., while Poshu Ram, (PW 7) saw the accused and the deceased at their house on the evening of the day of occurrence. The accused also does not deny that he was with the deceased at his house on the day of occurrence. The house of the accused, according to plan PM, consists of one residential room one other small room and a varandah. The correctness of that plan is

proved by A.R. Verma Overseer (PW 5). The fact that the accused alone was with Churi deceased in the house when she was murdered there with the Khokhri and the fact that the relations of the accused with the deceased, as would be shown hereafter, were strained would, in the absence of any cogent explanation by him, point to his guilt."

In the case of Trimukh Maroti Kirkan v. State of Maharashtra, JT 2006 (9) SC 50, the Supreme Court has observed as under:

"Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence took place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation

which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime...”

31. The principles enunciated by the Supreme Court in the above referred to judgments is squarely applicable to the facts of the present case. In instant case the prosecution has successfully established that the accused boarded the taxi of the deceased on 1.6.1998 at about 11:00-11:30 forenoon from the taxi stand situated near Surat Railway Station, the four witnesses who have identified the accused in TI Parade had witnesses the accused going in the taxi of the deceased and thereafter the deceased is not found alive and his dead body was found near bushes on the National Highway near Baman village under Karjan Police Station jurisdiction whereas both the accused were found at Devas with the Maruti Van belonging to the deceased with a fictitious number plate in front of the Maruti Van.

32. In instant case, as the evidence stands on the record, except the accused, there is nobody who can say as to what had happened on the fateful day after they left Surat in the taxi van of Mohmed Riyaz because there is no eye witness to the incident. Mohmed Riyaz is no more. The accused has not given any explanation as to what had happened to Mohmed Riyaz. They have not come with a case that they had relieved Mohmed Riyaz after reaching their destination and they do not know what happened to him thereafter and somebody might have murdered Mohmed Riyaz. They could not raise this contention because they were found in the Maruti Van belonging to the deceased after two days of the incident and no explanation is forthcoming from the accused as to how they have got the possession of the Maruti Van. Not only that they were found with the Maruti Van belonging to the deceased, but it was found with a fictitious number plate fitted in front of the Van and the original number plates were found underneath the seat of the Maruti Van. Since the accused have not opened their mouth as to what

had happened to Mohmed Riyaz, it is left to the guess work of everyone as to what could have happened to him. The prosecution has satisfactorily discharged its duty and has established that in all probability the murder of Mohmed Riyaz was committed by the accused and none else and hence now the onus of proving the innocence is shifted to the accused. But the accused have miserably failed to prove their innocence. The witnesses examined by the prosecution are of sterling quality and their evidence is reliable and trustworthy. It appears that the accused have come prepared with a well-designed plan. They came with the pre-prepared number plate. This is clear from the evidence of P.W.15, Manohar Kishanchand Nainani, Ex.55 and P.W.16, Satish Sahajarilal Chopra, Ex.56, who have stated that they have prepared the number plate. It is, therefore, clear that the accused wanted to take away some vehicle without difficulty. They contacted Salimbhai. May be, on seeing his physical structure, they might have thought that he is not the fit man, who can be

overpowered and, therefore, under the pretext that he has quoted a higher fare, they left him and on finding 'their man', who can be cowed by them, they approached Mohmed Riyaz, fixed the fare and left in the taxi from the taxi stand. It has come in evidence that out of the two accused, one was slim but the other was well built. A tamancha, a long knife and bloodstained clothes were found from the accused. They might have used the knife which was found near the place, where the dead body of Mohmed Riyaz was found, for committing his murder. With a view to disfigure his face, so that nobody can identify him, they struck on his face with the metal rock lying near the dead body. But, the close relatives of Mohmed Riyaz had no difficulty in identifying his dead body because he had grown up in front of them. The evidence of Dr. Jai Shah clearly shows that Mohmed Riyaz has died a homicidal death. In view of these facts and circumstances, if the accused does not offer any explanation as to how Mohmed Riyaz died, it is a strong circumstance which indicates that they are responsible for

commission of the crime. Therefore, we are of the firm opinion that the prosecution has successfully established its case beyond all reasonable doubts and its case has to be believed.

33. On re-appreciation, re-evaluation, re-analysis and close scrutiny of the evidence, according to us, the circumstances pitted by the prosecution to prove the guilt of the accused are duly established and all the circumstances unerringly pointing towards guilt of the accused and the circumstances taken cumulatively form a complete chain that there is no escape from the conclusion that within all probability the crime was committed by the accused and none else, and there cannot be another view than the view expressed by the trial Court.

34. We find ourselves in complete agreement with the findings, ultimate conclusion and resultant order of conviction and sentence passed by the

trial Court, as according to us, no other finding, conclusion or order except the one reached by the trial Court is possible on the evidence adduced by the prosecution and on the facts and in the circumstances emerging from the record of the case.

35. Seen in the above context, we do not find any merit in the appeals, therefore, we are not inclined to interfere with the judgment and order of conviction and sentence recorded by the trial Court. Both the appeals lack merit and, therefore, deserve to be dismissed.

36. For the foregoing reasons, both the appeals fail and accordingly they are dismissed, the result of which is that the judgment and order dated 25.5.2004 rendered by the learned Additional Sessions Judge, 2nd Fast Track Court, Surat in Sessions Case No.57 of 1999 convicting and sentencing the accused is hereby confirmed

and maintained.

(A.M. Kapadia, J.)

(Harsha Devani, J.)

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(karan)